

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 10 July 2013

Public Authority: Shropshire Council
Address: Shirehall
Abbey Foregate
Shrewsbury
Shropshire, SY2 6ND

Decision (including any steps ordered)

1. The complainant has requested information relating to the costs of the Shrewsbury Museum and Art Gallery project.
2. The Commissioner's decision is that Shropshire Council (the Council) has correctly applied section 43(2) to the withheld information.
3. The Commissioner does not require the Council to take any steps as a result of this decision notice.

Request and response

4. On 5 November 2012, the complainant wrote to the Council and requested information in the following terms:

"I am making a Freedom of Information request in regard to the Shrewsbury Museum and Art Gallery project. Please could you provide a response to the following queries:

1. *The official budget for the project is £10.5 million. How much of this figure is the contingency budget?*
2. *How much of the contingency budget has been spent?*
3. *Have any of the plans for the site been altered as a result of the delays to the project and the problems discovered at Vaughan's Mansion?*

4. *Are there any disputed payments between Shropshire Council and the contractor ISG Construction? If so, what are the disputes and what is the total amount of the disputed payments?*
5. *Are any additional costs due over the increased amount of time scaffolding has remained up at the site? What are they?"*
5. The Council responded on 3 December 2012. It provided a response to part 3 of the request however it refused to provide the remaining information stating that it was exempt under section 43 of the FOIA.
6. Following an internal review the Council wrote to the complainant on 11 January 2013. It revised its position and provided further information in response to parts 4 and 5 of the request. It maintained its position with regard to parts 1 and 2 of the request.

Scope of the case

7. The complainant contacted the Commissioner on 11 January 2013 to complain about the way his request for information had been handled and stated:

"Both questions are related to the contingency budget for the project – namely how much it was and how much of that money has now been spent. I do not believe S43 of the Freedom of Information Act 2000 – Commercial Interests has been applied correctly in this case. I believe there is a clear public interest in these figures being published, given the scheme is two years behind schedule and follows a series of other recent Shropshire Council projects where overspending has been an issue."

8. The Commissioner considers the scope of this case to be to determine if the Council has correctly applied section 43 of the FOIA to parts 1 and 2 of the request.

Reasons for decision

9. Section 43(2) of FOIA states –

"Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it)."

10. The exemption is designed to protect the ability of a party to participate competitively in a commercial activity, particularly the purchase and sale of goods or services. As a prejudice-based exemption, section 43(2) will

only be found to be engaged where a public authority can demonstrate that disclosure would, or would be likely to, result in some detriment to the commercial interests of a party. Even if this initial test is satisfied, section 43 is a qualified exemption which means that a public authority must consider the public interest in disclosure.

11. The Council has explained that the original public Committee Report dated 29 February 2008 identified a budget of £10,556,972 which included a contingency allowance of £910,000. The complainant already has a copy of this report.
12. At the time the contract was placed, the contractor was instructed to include provisional sums for contingencies. At this time the project showed a budget surplus and this was allocated to various risk items and a client held contingency, which was not disclosed to the contractor. The additional client held contingency amount is the information being withheld.
13. It further explained that the contingency allowance has varied throughout the life of the project as allowances for each element of the project gets confirmed and monies either get transferred into or out of the contingency allowance.
14. At the time of the request the client contingency forecast to be remaining at the end of the project is the information being withheld.

The prejudice test

15. In the Commissioner's guidance¹ on the prejudice test he observes that, in legal terms, the word 'prejudice' is commonly understood to mean harm. To say that disclosure would or would be likely to prejudice the interests specified in the exemption implies that it would (or would be likely to) harm those interests.
16. The now common approach to considering the prejudice test was set out in the Information Tribunal's decision on *Hogan*². The Tribunal in that

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http://www.ico.org.uk/for_organisations/guidance_index/~/_media/documents/library/Freedom_of_Information/Detailed_specialist_guides/AWARENESS_GUIDANCE_5_V3_07_03_08.ashx

2

<http://www.informationtribunal.gov.uk/DBFiles/Decision/i42/MrCMHoganandOxfordCityCouncilvInfoComm17Oct06.pdf>

case decided that the framework for assessing the test involved in the advance of three principal questions. (1) What are the applicable interests within the exemption? (2) What is the nature of the prejudice being claimed and how will it arise? (3) What is the likelihood of the prejudice occurring?

17. Therefore, the first issue for the Commissioner to assess is whether, in this case, the Council has identified relevant prejudices that the exemption is designed to protect against. If this is not found to be the case, the exemption is not engaged and there is no requirement to go on to consider the prejudice or public interest tests.
18. The term 'commercial interests' is not defined in the FOIA, however, it is understood to have a broad meaning, encompassing the activities which have both a direct and an indirect effect on commercial activities. This will therefore include the buying or selling of goods and services as well as information which can be shown to affect a person's ability to undertake such activities effectively.
19. The Council has argued that section 43(2) is engaged with regard to its own commercial interests as it relates to the Council's financial affairs and on-going contractual arrangements with the Council's contractor.
20. The Commissioner accepts that the information withheld does relate to commercial interests. The next step is therefore to consider the nature and likelihood of the prejudice in those commercial interests.
21. In the Commissioner's view, the term "prejudice" implies not just that the disclosure of information must have some effect on the applicable interest, but that this effect must be detrimental or damaging in some way. If a "trivial or insignificant" prejudice is claimed, such that it cannot be said to have any real detrimental effect, then the exemption should not be accepted. The detrimental effect need not necessarily be severe although the level of severity will inform any relevant public interest considerations.
22. There are two limbs of prejudice within section 43(2). "Would be likely to prejudice" means that the possibility of prejudice should be real and significant, and certainly more than hypothetical or remote. "would prejudice" places a much stronger evidential burden on the public authority and must be at least more probable than not. The Council has stated that disclosure of the requested information *would be likely* to prejudice commercial interests.

Prejudice to the Council's commercial interests

23. The Council has argued that disclosure of the information would be likely to prejudice its own commercial interests.

24. The Council explained that the contract with the contractor is dated 9 December 2010. The commercial negotiations with the contractor are related to post-contract variations and loss and expense claims which are on-going, and are unlikely to be concluded for some considerable time.
25. It further explained that it is considered to be detrimental to the on-going commercial negotiations to release the information as this would show the contractor what the Council had available by way of contingency budget.
26. The Council contended that the commercial prejudice is "real, actual or of substance" as the release of the amount of contingency that the Council forecasts that it still has would give the contractor an indication of what the Council had available by way of contingency budget and therefore prejudice its negotiating position.
27. Having considered the Council's argument, the Commissioner is satisfied that disclosure of the information would be likely to undermine the Council's ability to complete its negotiations with the contractor. As he has concluded that the exemption is engaged he has gone on to consider the public interest.

Public Interest in favour of disclosure

28. The Council acknowledged that there is a public interest in disclosure to promote accountability and transparency in the spending of public money. It also acknowledged that the weight of this argument is arguably greater at the present time given the current economic climate.
29. The complainant has argued that he believes there is a clear public interest in these figures being published given the scheme is two years behind schedule and follows a series of other recent Shropshire Council projects where overspending has been an issue. Therefore the Commissioner acknowledges that release of this information may help the public to ensure that the project is financially on track and that public money is being used efficiently.

Public interest in favour of maintaining the exemption

30. The Council argued that disclosure of the information requested could compromise its commercial position and could therefore impact the public purse.
31. The Council has an obligation to ensure public monies are used effectively and that it minimises risks where possible, and in the current fiscal climate this is even more important. The Council also has an

obligation to secure the best value in its commercial negotiations and disclosure of this information may affect the Council's ability to do this for the reasons explained in paragraphs 25 to 27 above.

Balance of the public interest

32. The Commissioner has given due weight to the general public interest in transparency and accountability around the expenditure of public funds, particularly where there are concerns of a risk of project overspending if further delays occur. The Commissioner accepts that there is always a public interest in ensuring that public authorities are transparent and able to demonstrate they are acting appropriately in the best interests of the public.
33. The Commissioner has decided on balance that, in all the circumstances of the case, the public interest in the Council maintaining the commercial interest exemption outweighed that in disclosing the information. He has concluded that it would not be in the public interest to disclose information which could undermine the Council's negotiating position in obtaining the best value in this contract whilst the project is still live. In reaching this decision he has placed considerable weight on the fact that the contract negotiations in relation to post-contract variations and loss and expense claims were still on-going at the time of the request, and are unlikely to be concluded for some considerable time.
34. The Commissioner has therefore decided that the Council has correctly withheld the relevant information.

Right of appeal

35. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

36. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
37. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Pamela Clements
Group Manager, Complaints Resolution
Information Commissioner's Office
Wycliffe House
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